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Supreme Court, U.S.
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No. 10-482

IN THE
Supreme Court of the United States

IN THE MATTER OF VELOCITA WORLDWIDE LOGISTICS, INC.,
Debtor.

DANIEL SHERMAN,
Petitioner,
v.
WILLIAM LAMOTHE, RAJAN SOBHANI, CHRIS BRACK, DANIEL ESTRADA, SCOTT STUDEBAKER, JAMES MICHAEL WALSH, BRANDON ROBINSON, AND PATRICK STRAYER
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals decided this bankruptcy appeal by resolving on policy grounds what it deemed a question of first impression under Texas law, without certifying that question to the Texas Supreme Court. In doing so, the court disregarded two Texas Supreme Court decisions from the 1890's, apparently deeming them too old to be instructive. The question presented is:

1. Whether a circuit court acts inconsistently with this Court's decision in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974), or otherwise commits error, by deciding a state-law question without certifying that question to the state's supreme court where—

- the question presented is important to the state's jurisprudence,
- there is authority—old but not overruled—from the state's supreme court resolving the question contrary to the federal court's resolution of it,
- the question is difficult enough that the three federal courts to address it all resolve it on different theories and grounds, and
- the federal court decides the issue on policy grounds.

PARTIES TO THE PROCEEDING

Petitioner is Daniel Sherman, bankruptcy trustee in *In re Velocita Worldwide Logistics, Inc.* Respondents are William LaMothe, Rajan Sobhani, Chris Brack, Daniel Estrada, Scott Studebaker, James Michael Walsh, Brandon Robinson, and Patrick Stryer, who were defendants in the trustee's adversary action in the bankruptcy court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Sherman respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, at 1a-8a) is reported at 608 F.3d 212. The order of the court of appeals denying rehearing (App., *infra*, at 22a) is not reported. The district court's judgment (App., *infra*, at 9a) and opinion (App., *infra*, 10a-15a) are unreported, as is the bankruptcy court's order (App., *infra*, at 16a-21a).

JURISDICTION

The Fifth Circuit filed its opinion on June 2, 2010, and denied a timely petition for rehearing on July 12, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Rule 58.1 of the Texas Rules of Appellate Procedure provides that:

> The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

STATEMENT OF THE CASE

This case presents an optimal vehicle for this Court to refine its instruction on when federal courts should certify state-law questions in non-diversity cases not involving constitutional challenges. The case is ideal because of its unique and narrow facts, which would permit this Court to provide much-needed guidance on certification while preserving the broad grant of discretion enunciated in earlier cases.

If left undisturbed, the Fifth Circuit's opinion will encourage federal courts to resolve difficult and important state-law questions—even in non-diversity cases—on policy grounds, substituting their own policy analysis for that of the state's highest court and upsetting the delicate balance between the national and state judiciaries envisioned by our federal system. That imbalance is exacerbated in this case by the existence of old but never-overruled precedent seeming to contradict the circuit court's decision.

This case arose from a settlement agreement entered as a final judgment. That agreement required a company and ten individuals to pay, "jointly and individually," the sum of $1.85 million. The question presented was whether the company, having paid the entire amount, could pursue the individuals for their *pro rata* shares of the obligation.

1. ***The Underlying Litigation.*** William LaMothe founded a freight-forwarding company and sold it to a predecessor of Exel Global Logistics. ROA

at 48. Mr. LaMothe and several of his employees signed five-year employment agreements with Exel. ROA at 48. Just before expiration of those agreements, Mr. LaMothe formed a new company, which eventually became Velocita Worldwide Logistics. ROA at 48. When the five-year period ended, Mr. Lamothe and his employees left Exel to work for Velocita—now an Exel competitor ostensibly owned and operated by Mr. LaMothe's wife. ROA at 48.

Exel sued Velocita and ten of its employees, all of them former Exel employees (eight of whom are the respondents in this case). 2 BR at 0091. The parties settled the litigation, executing an "Agreed Final Judgment and Permanent Injunction" as their settlement agreement. 2 BR at 0237-0275. That agreement required Velocita to cease operations and imposed a host of other obligations including numerous injunctions against the individual defendants. BR-2 at 0237-0275. The agreement also obligated Velocita and the individual defendants to pay Exel the sum of $1.85 million:

> Defendants Velocita, Lamothe, Sobhani, Brack, Estrada, Studebaker, Alexander, Walsh, Mok, Robinson and Strayer, jointly and individually, shall be and are hereby ordered to pay to Excel, its successors and assigns, the amount of $1,850,000.00 . . . .

2 BR at 0255.

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[1] The Record on Appeal is referenced as ROA, while the Bankruptcy Record is referenced as BR.

Despite their individual liability, none of the individual defendants paid a single cent of the settlement—instead, Velocita paid the entire $1.85 million. 2 BR at 0135-0136. Velocita raised these funds by selling its equipment assets and by obtaining a $1 million loan—secured by the company's receivables—from another LaMothe entity. 2 BR at 0125-0126, 0130-0131. Velocita then collected its receivables and repaid the LaMothe loan, making its last payment on the final day of the company's fiscal operations. 2 BR at 0126. Nine days after expiration of the one-year preference period on the LaMothe loan payment, and facing numerous unpaid creditors, Velocita sought bankruptcy protection.

2. ***District Court Proceedings.*** The bankruptcy trustee, Daniel Sherman, filed an adversary proceeding to recover the individuals' *pro rata* shares of the settlement payment. Both parties sought summary judgment. The bankruptcy court granted summary judgment to the defendants based on the Texas Supreme Court's decision in *Beech Aircraft Corp.* v. *Jinkins*, 739 S.W.2d 19 (Tex. 1987), denying any right of contribution against a non-settling joint tortfeasor. App., *infra*, at 16a-21a; 1 BR at 0003-0006.

The district court affirmed that decision, but on different grounds, holding that the parties' failure to include an express contribution clause in their settlement agreement precluded any right to contribution based both on legal principles and public policy favoring settlement of litigation. App., *infra*, at 10a-15a; ROA at 101-105.

3. ***Fifth Circuit Proceedings.*** On appeal, Mr. Sherman's brief relied principally on two Texas Supreme Court cases from the 1890's establishing an implied right of contribution among co-obligors on a contract. Mr. Sherman did not seek certification at the briefing stage because he believed those cases governed the dispositive state-law issue.

During oral argument, one of the circuit judges almost immediately interrupted Mr. Sherman's counsel and expressed the opinion that the Texas Supreme Court's decisions on the matter simply were too old. Another circuit judge inquired about certification to the Texas Supreme Court.[2]

In its opinion, the court of appeals characterized the question as one of first impression in Texas, stating that "[t]his appeal asks us to consider whether Texas law would imply a right of contribution for a co-obligor of a settlement agreement that paid more than its proportionate share of the settlement." App., *infra*, at 3a. The court of appeals acknowledged Mr. Sherman's reliance on the two cases, describing them as "two century-old Texas cases that recognize an implied right to contribution." *Ibid.* But the court did not otherwise discuss or distinguish those cases. Neither did the court rely on—or even mention—the bankruptcy court's joint tortfeasor analysis or the district court's express contribution clause analysis. Instead, the court of appeals simply concluded that public policy weighs against permitting an implied right of

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[2] The oral argument is available on the "Oral Argument Recordings" portion of the Fifth Circuit's website.

contribution from a settlement agreement. App., *infra*, at 7a.

After receiving the opinion, Mr. Sherman filed a petition for rehearing urging the court of appeals to reconsider its refusal to credit the state-court decisions. Mr. Sherman also asked that if the court of appeals would not credit those decisions, and continued to view the question as one of first impression turning on policy grounds, that it certify the question to the Texas Supreme Court.

REASONS FOR GRANTING THE WRIT

This case demonstrates the need for further guidance on certification in non-diversity, non-*Pullman* cases. In this case, three federal courts attempted to decide what they considered an unsettled but important question of Texas law; though they all reached the same result, each of them relied on a different legal theory to do so. There are three reasons this Court should grant the writ of certiorari in this case.

First, the circuit court's failure to certify the dispositive question in this case conflicts with this Court's decision in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974), vacating a circuit court's decision and remanding for certification under similar circumstances.

Second, failure to certify this case cannot be squared with traditional notions of judicial federalism. "When federal courts decide unsettled questions of state law in cases involving policy judgments with widespread impact, the intrusion on state sovereignty is at its greatest." *See* Jessica

Smith, *Avoiding Prognostication and Promoting Federalism: The Need for An Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N. CAR. L. REV. 2123, 2135 (1999) (citation omitted).

Finally, the court of appeals incorrectly substituted its policy judgment for valid state-law precedent. Texas law permits the contribution claim brought by Mr. Sherman.

I. THE FIFTH CIRCUIT'S REFUSAL TO CERTIFY THIS CASE CONFLICTS WITH THIS COURT'S REASONING IN *LEHMAN BROS.* AND VIOLATES BASIC TENETS OF FEDERALISM.

Most of this Court's certification decisions concern abstention under *R. R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496 (1941). These cases usually involve constitutional challenges to state statutes. *See, e.g., Belotti* v. *Baird*, 428 U.S. 132, 150-53 (1976); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 79 (1997). The use of certification is relatively clear under *Pullman* abstention, where federal courts certify a question only where the challenged statute is fairly subject to a narrowing interpretation which would render unnecessary or substantially modify the federal constitutional question. *See Houston* v. *Hill*, 482 U.S. 451, 468-471 (1987) (*citing Harman* v. *Forssenius*, 380 U.S. 528, 534-535 (1965) and *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 236 (1984)).

This case presents certification in a different context, a non-diversity case not involving *Pullman* abstention. In this context, certification trenches

upon the framework of our federal system, and its delicate balance between national and state judicial power.

The circuit court's decision in this case is difficult to reconcile with this Court's decision in *Lehman Bros.*, which involved a diversity lawsuit in federal court in New York, in which liability turned on an unsettled question of Florida law. The district court resolved that question based on Florida intermediate appellate decisions and rendered judgment. The court of appeals reversed, finding no Florida cases decisive and applying the law of other states to predict the likely outcome in Florida. *Ibid* at 388-89. This Court vacated the circuit court's decision and remanded the case for consideration of certification to the Florida Supreme Court.

This Court relied on three factors in suggesting that certification was warranted: (1) the novelty of the question, (2) the "great unsettlement" of state law concerning it, and (3) the distance of the New York federal court from Florida. *Ibid* at 391. Two of those three factors are present in this case, along with a host of others not presented by *Lehman Bros.*

The question in this case—whether a co-obligor to a settlement agreement who pays an obligation under that agreement has an implied right to contribution from non-paying co-obligors—is a novel one under Texas law. Indeed, the respondents argued with vigor that Texas courts never have confronted it. And neither the parties nor the court of appeals cited any case from any other jurisdiction considering it. Despite Mr. Sherman's

position that valid Texas precedent governs the matter, the three federal courts to examine this issue relied on three different theories in resolving it. It would appear, then, that the matter is neither clear nor easily determined by federal judges. After all, the court of appeals decided that the bankruptcy and district court judge applied the wrong law to the case—and both of them are Texas judges. This raises the risk that even the circuit court's interpretation of Texas law may be wrong.

Certification reduces the risk of this type of erroneous guess by a federal court concerning state-law issues. These erroneous guesses inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court, and skew the decisions of people and businesses who rely on them. Moreover, as this Court has pointed out, "[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is . . . supplanted by a controlling decision of a state court." *Pullman Co.*, 312 U.S. at 500. In a case like this, certification is better than "the sometimes scholastic, always uncertain exploration into what the local Judges would say they would say the local law is." *Martinez* v. *Rodriguez*, 410 F.2d 729, 730-31 (5th Cir. 1969).

The court of appeals viewed its task as predicting "whether Texas law would imply" a contribution right under a settlement agreement. Attempting to predict a state court's decision in any case is a difficult task. As one court summarized this frustrating process of judicial soothsaying: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about

which neither has thought." *Nolan* v. *Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960), *rev'd*, 365 U.S. 293 (1961).

In contrast, if the state's highest court hears the question, its response will be definitive. Because that court is the final arbiter of state law, its decision always will be correct. And the state court decision will create certainty, which benefits future parties (who know their rights) and the court system as a whole (by reducing litigation). Finally, the Texas certification rule permits the Texas Supreme Court to decline certification; the court might well do so in this case based upon its previous decisions concerning contribution. And that decision would also provide a definitive answer.

Of course, this case differs from *Lehman Bros.* because the Fifth Circuit regularly reviews Texas law. But this case also presents other factors weighing in favor of certification and not present in *Lehman Bros.* The most important among these is the policy-laden analysis underlying the decision by the court of appeals. Without certification in this situation, federal courts "are forced to make important state policy, in contravention of basic federalism principles." *Hakimoglu* v. *Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting). In contrast, certification helps "build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391.

Certification also fosters comity by affording state judges control over the content of state law. Resolving unsettled issues of state law requires value-laden policymaking; state judges, immersed in

their state's social and legal milieu and accountable to its citizens, should decide those issues. That the state should have the opportunity to declare and control the development of state law, particularly when important state policies hang in the balance, seems self-evident in our federal system. As one state supreme court has explained:

> [A]part from the most fundamental principle of "our federalism"—that the state court of last resort is alone the supreme arbiter of the substantive content of the law of the State—a concern to promote federal-state comity would counsel that, whenever reasonably possible, the state court of last resort should be given opportunity to decide state law issues on which there are no state precedents which are controlling or clearly indicative of the developmental sequence of state law.

White v. *Edgar*, 320 A.2d 668, 675 (Me. 1974) (footnote and citation omitted).

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO REFINE THIS COURT'S INSTRUCTIONS ON CERTIFICATION WITHOUT LIMITING THE BROAD DISCRETION ENUNCIATED BY PRIOR DECISIONS.

Even in the *Pullman* abstention arena, the circuit courts have struggled to enunciate consistent standards for certification. According to one court of appeals, "[s]ubstantial doubt about a question of

state law upon which a particular case turns should be resolved by certifying the question to the state supreme court." *Jones* v. *Dillard's, Inc.*, 331 F.3d 1259, 1268 (11th Cir. 2003); *see also Stevens* v. *Battelle Memorial Institute*, 488 F.3d 896, (11th Cir. 2007). But most circuit courts apply a fairly rigorous three-part test before certifying a case. *See, e.g., McRedmond* v. *Wilson*, 533 F.2d 757, 761 (2d Cir. 1976).

Given the uncertainty surrounding certification—underscored by the circuit court's failure to certify this case despite its similarity to *Lehman Bros.*—additional guidance from this Court would be helpful both to judges and litigants. At the same time, this Court has made clear its reluctance to make any decision infringing on the broad discretion afforded to lower courts in evaluating the advisability of certification. *See Lehman Bros.*, 416 U.S. at 392 (Rehnquist, J., concurring).

This case presents an ideal vehicle to refine this Court's guidance on certification. The unique and extraordinary circumstances in this case mean the decision in this case will *inform*—rather than *inhibit*—the exercise of discretion by federal judges in deciding certification requests. Those unique and extraordinary circumstances include state law so unclear that three federal courts applied three different theories in attempting to ascertain it, a circuit court opinion based entirely on policy grounds, an issue of importance to the state's jurisprudence, and—perhaps most important—the absence of any significant issue of federal law.

As a result, this Court can further illustrate for lower federal courts the types of factors supporting certification in a limited decision that will preserve the broad scope of discretion previously established.

III. THE FIFTH CIRCUIT INCORRECTLY APPLIED TEXAS LAW AND POLICY CONCERNS IN REJECTING MR. SHERMAN'S CLAIM.

The opinion by the court of appeals appears to grant that the cases cited by Mr. Sherman established a right of contribution among co-obligors, but states that Texas courts "have not found occasion to extend the contribution right implied in guaranty and surety agreements to other types of contracts" (Opinion at 4). But in *Mateer* v. *Cockrill*, 45 S.W. 751 (Tex. Civ. App. 1898), the court applied the right even though it explicitly stated the obligations at issue were not the same as those in a note or guaranty:

> We think the duties and liabilities of these guarantors, as between themselves, are not in all respects the same as those existing between the guarantors of a note or bond for payment of definite sums of money upon default by the payor or obligor.

Ibid at 755. So almost from the beginning, the right extended beyond the payment of money and applied to promises to "pay a sum of money to, ***or to do something for***" another party. *Faires* v. *Cockrill*, 31 S.W. 190, 193 (Tex. 1895) (emphasis added).

This Texas rule comports with the general American doctrine that "[w]here several obligors are jointly or jointly and severally bound as principals upon an obligation founded in contract, one who has rightfully paid more than his share of the joint obligation may recover contribution from his cocontractors." 18 AM. JUR. 2D *Contribution* § 31 (1985) (citations omitted). And this is true "when the parties are under a common burden, obligation, or liability, regardless of whether such common burden is one assumed by the parties through contract, one devolving upon them as co-owners of property, one imposed by statute, or one which the law imposes equally on the parties in certain cases . . . ." *Ibid* § 10 (citations omitted).

In essence, Texas treats contractual co-obligors as sureties for each other. In practical effect, each co-obligor is a principal as to his share, and a surety as to the others' shares. Respondents and Velocita entered into a single promissory sentence with respect to payment of the settlement funds, and each of them was a principal as to his own share and a surety as to the others' shares.

The court of appeals disregarded these Texas cases and decided the case on policy grounds. Even if the circuit court's policy analysis is correct—and it is not—it would not constitute a basis for ignoring established Texas law. The court of appeals was tasked with ascertaining what the law is in Texas, not what it ought to be based on policy concerns. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 487 (1941).

Enforcing the settlement agreement by holding respondents accountable for their respective portions of the common liability will not discourage settlements. Any small number of settlements deterred by this case would be offset by the numerous defendants more likely to enter into joint and several settlements knowing they can enforce those settlements against co-obligors who refuse to pay their shares.

Even for parties who may be skittish as a result of this case, the most likely result will not be to discourage settlements but instead to promote better-drafted settlement agreements. In this case, respondents agreed to be jointly and individually liable for the entire settlement amount. If they did not wish to be jointly and individually liable—and therefore subject to this contribution claim—all they had to do was specify each party's specific financial obligation or state that Velocita alone was responsible for payment of the monetary settlement.

If the Texas contribution scheme disquiets litigation, Texas courts apparently deem that an acceptable cost. Contribution claims often are disquieting by their very nature, sometimes necessitating reopening underlying disputes. And judicial economy prefers resolution of all disputes in a single controversy. But Texas courts have deemed these costs to judicial economy warranted in permitting, for example, a contribution claim by one judgment debtor against another. *Greenspan* v. *Green*, 255 S.W.2d 917 (Tex. Civ. App. – Dallas 1953, writ ref'd n.r.e). In *Greenspan*, the Texas court of appeals upheld a summary judgment by Judge

Sarah Hughes permitting a contribution claim by a judgment co-obligor.

IV. MR. SHERMAN PROPERLY REQUESTED CERTIFICATION.

Mr. Sherman requested certification in his timely petition for rehearing. Normally, this Court might look askance at such a late request, but the timing of the request is understandable in the context of this case. The Texas Supreme Court cases govern this matter, and Mr. Sherman had no idea the court of appeals would consider those cases unworthy of respect due to their age until issuance of the opinion. Under these limited circumstances, Mr. Sherman's request for certification on petition for rehearing should be sufficient.

In any event, there is no requirement—jurisdictional or prudential—as to when a certification request must be made. Even if there were, this Court finds exceptions even to entrenched jurisdictional requirements like the final-judgment rule. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 484-86 (1975).

CONCLUSION

Based on this Court's decision in *Lehman Bros.*, and principles of comity and federalism, the petition for a writ of certiorari should be granted. Alternatively, this Court should vacate the circuit court's decision and remand the case for certification.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT COURT

No. 09-10416

In the Matter of: VELOCITA WORLDWIDE LOGISTICS INC.

Debtor

DANIEL SHERMAN,

Appellant

v.

WILLIAM LAMOTHE; RAJAN SOBHANI; CHRIS BRACK; DANIEL ESTRADA; SCOTT STUDEBAKER; JAMES MICHAEL WALSH; BRANDON ROBINSON; PATRICK STRYER,

Appellees

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 3:08-CV-1516

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Daniel Sherman (the "Trustee"), bankruptcy trustee for Velocita Worldwide Logistics, Inc. ("Velocita"), appeals the district court's judgment affirming the bankruptcy court and declining to imply a right of contribution among defendants who agreed to be jointly and individually liable for a payment as part of the settlement agreement for as state tort action.

I.

The eight appellees (collectively, the "Employees")[1] worked for Velocita, a shipping company. A competing shipping company, Exel Global Logistics ("Exel"), sued Velocita and the Employees for trade secrets violations. After several months of acrimonious litigation, the parties settled the case. In addition to dozens of pages of injunctions against Velocita and individually tailored injunctions against the Employees, the settlement agreement contained a clause requiring $1.85 million payment to Exel. In the payment clause, Velocita and the Employees agreed to be "jointly and individually" liable to pay Exel a $1.85 million. Velocita paid the entire $1.85 million and later entered bankruptcy when it could not meet the demands of its creditors.

[1] Although the underlying suit involved ten employees, only eight are party to the instant appeal.

The Trustee brought suit against the Employees, attempting to force them to pay their pro rata share of the $1.85 million to Velocita. Since the settlement agreement made no mention of contribution, the Trustee relied on an implied contractual right to equitable contribution. Both the bankruptcy court and the district court denied relief. The Trustee timely appealed to this court.

II.

This appeal asks us to consider whether Texas law would imply a right of contribution for a co-obligor of a settlement agreement that paid more than its proportionate share of the settlement.[2] The Trustee relies primarily on *Faires v. Cockrill*, 31 S.W. 190 (Tex. 1895), and *Merchants' National Bank v. McAnulty*, 33 S.W. 963 (Tex. 1896), two century-old Texas cases that recognize an implied right to contribution. The Employees argue that the doctrine announced in these cases has only been applied to sureties and guaranties in the 100 years since it was announced, and caution against expanding its application here.

Under Texas law, a claim for contribution is separate from the underlying tort or contract. "The obligation to contribute is not founded upon contract. . . but upon principles of equity and natural justice which requires [sic] that one shall not be made to bear more than his jut share of a common burden to

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[2] Since the appeal is taken from the district court's summary judgment ruling, our review is *de novo*. *Mongrue v. Monsanto Co.*, 249 F.3d 422, 428 (5th Cir. 2001). We apply the same standards as the district court. *Id.*

the advantage of his co-obligors." *McKelroy v. Hamilton*, 130 S.W. 2d 1114, 1116 (Tex. Civ. App. 1939). The reasoning that underlies the right of contribution is that the co-obligors have made an implied promise to bear the burden equally: "[i]n suits for contribution the right of action is on the *implied promise* for reimbursement and not upon the debt." *Miller v. Miles*, 400 S.W. 2d 4, 7 (Tex. Civ. App. 1966) (emphasis added).

Texas courts have long allowed actions for contribution in guaranty and surety cases even where the right was not set out in the note or contract. Occasionally, Texas courts have recognized the right to contribution in language broad enough to be construed to cover the situation here. *See, e.g., Employers Cas. Co. v. Transp. Ins. Co.*, 444 S.W.2d 606, 609 (Tex. 1969) ("The general contribution rule is announced in 18 AM. JUR.2d 16, Contribution § 7, in this language: 'The primary requisites of the equitable right to contribution . . . are (1) a situation wherein the parties are in *aequali jure* under some common obligation or burden, and (2) compulsory payment or other discharge, by the party seeking contribution, of more than his fair share of the common obligation or burden.'"). Other cases have defined the right to implied contribution more narrowly. "Under Texas law, there is a very limited right of contribution on a breach of contract claim; that is, a contribution right exists among co-guarantors on a note, or in any situation where there is an implied promise of co-obligors to pay their proportionate shares of a common obligation." *Interstate Contracting Corp. v. City of Dallas*, No.

3:98-CV-2913-M, 2000 WL 1281198 at *4 (N.D. Tex. Sept. 8, 2000)(unpublished), *rev'd on other grounds*, 407 F.3d 708 (5th Cir. 2005).

Notwithstanding the broad language quoted above, Texas courts, to the best of our knowledge, have not found occasion to extend the contribution right implied in guaranty and surety agreements to other types of contracts. Because the doctrine has been limited to guaranty and surety agreements, it stands to reason that features of these contracts make them more conducive to equitable contribution than other types of contracts. An examination of the underlying reasons why Texas courts have allowed contribution only in these limited types of agreements bears out this contention.

First, in sureties and guaranties, the subject matter of the contract is (generally) money that has been lent to one party on the binding assurance of another or others. Should the lendee fail to repay, the only contested item is completely fungible and thus easily divisible, making pro rata liability simple to calculate and knowable in advance. Second, contribution accords with the settled expectation of the guarantors: if there are three guarantors, in the absence of contractual provisions to the contrary, each can expect to bear no more than one-third of the amount at issue. The implied promise underlying the right to contribution is implied because it is expected and desired *ex ante*. Disallowing contribution would force each guarantor in a multi-party guaranty to gamble with his potential liability. This would stifle the lending that guaranties

encourage. Third, contribution in the world of guaranties and sureties is both fair and efficient. It speeds the collection process for lenders and ensures that each of the guarantors or sureties is treated equally by default. In sum, surety and guaranty contracts feature both an easily divisible subject matter and an unmistakable underlying intent as to how the parties will bear the risk of default by the lendee.

Assuming *arguendo* that Texas courts would imply a right to contribution in settlement agreements as a general matter, we decline to do so here. The factors that justify the contribution right implied in sureties and guaranties are absent here. First, the subject matter of the settlement agreement involved more than money. Although a $1.85 million payment constituted one part of the agreement, the remainder comprised individually tailored injunctions against the Employees and Velocita.[3] Texas courts have recognized that the general rule of an equally divided pro rata contribution is altered when, for example, co-obligors

---

[3] The presence of disparate injunctions, in addition to money, distinguishes the instant case from *Greenspan v. Green*, 255 S.W.2d 917 (Tex. Civ. App. 1953). In *Greenspan*, a bankruptcy trustee was allowed to assert a contribution claim against a co-judgment debtor, even though the "joint judgment [was] without a provision for contribution between the co-debtors." *Id.* at 918. Although the case supports the Trustee's position, it is not entirely analogous because the underlying judgment only involved money, thus making it more similar to a surety or guaranty than the instant settlement agreement. Furthermore, at oral argument, the Trustee specifically disavowed any theory of recovery based on co-debtor status.

shared unequally in the consideration received out of the note, in which case "contribution my be prorated according to the benefits each received." *Dittberner v. Bell*, 558 S.W.2d 527, 534 (Tex. Civ. App. 1977). In this case, the benefits that the individual Employees received from being released from the suit were presumably not equal. Some Employees must have been less involved in the actions that Exel alleged were trade secret violations. The individually tailored injunctions support this contention: LaMothe, for example, faced an injunction that was notably more strict than that faced by the other Employees. Thus, contrary to the Trustee's arguments, implying a right to contribution would necessarily force the district court to open up the underlying settlement to determine an equitable division among the Employees.

The instant facts are in stark contrast to the situation in *Dittberner*, where the court was able to find the amount of consideration received by each party to the promissory note as a percentage of the whole. *Id.* at 534. In cases where the percentage that each party should bear is obvious from the face of the contract or where the parties entered into the arrangement with their potential share of liability allocated by existing law, it is relatively easy for the courts to calculate each party's contribution. The implied promise on which the right of contribution rests is more plausible in such cases. The difficulty of equitably apportioning contribution here weighs against implying the remedy.

Additionally, nothing indicates that contribution would accord with the expectations of the Employees and Velocita. Allowing contribution would imply an eleven-way promise that the Employees and Velocita would almost surely not have made in the circumstances of this case.[4] The Trustee has not pointed to anything in the record indicating that, *ex ante*, the Employees contemplated an arrangement at all analogous to a guaranty.

III.

In conclusion, we do not find the obligations in the instant settlement agreement to be analogous to the obligations in surety and guaranty agreements, the contractual arrangements in which Texas courts have allowed contribution claims against co-obligors. Here, where each party appears to have received a different benefit from the settlement agreement, the shared burden is neither completely fungible nor easily divisible. Accordingly, we affirm the district court's judgment that, on these facts, a right to contribution should not be implied.

AFFIRMED.

HAROLD R. DeMOSS, JR., Circuit Judge, concurs in the judgment only.

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[4] Each of the Employees had a different interest in Velocita; LaMothe, for example, appears to have been a principal in the company. We find it highly unlikely that the more "minor players" signed the agreement with the understanding that they could each be liable for approximately $200,000 of the payment to Exel.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DANIEL J. SHERMAN,	§	
	§	
Appellant,	§	
	§	
v.	§	Civil Action No.
	§	3:08-CV-1516-K
WILLIAM LaMOTHE, et al.,	§	
	§	
Appellees.	§	

JUDGMENT

The Court having affirmed the order of the United States Bankruptcy Court on the matters appealed in this case, judgment is hereby entered for Appellees. It is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

the bankruptcy court's order of June 9, 2008, granting summary judgment is **affirmed**.

Signed March 26th, 2009.

s/ Ronnie Jacobson
RONNIE JACOBSON
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DANIEL J. SHERMAN,	§	
	§	
Appellant,	§	
	§	
v.	§	Civil Action No.
	§	3:08-CV-1516-K
WILLIAM LaMOTHE, et al.,	§	
	§	
Appellees.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is an appeal from the bankruptcy court's order granting summary judgment in Adversary No. 06-03533 on June 9, 2008, and Appellees' Motion for Leave to File a Sur-reply (Doc. No. 17). The Court **DENIES** the motion for leave to file a sur-reply and turns to the appeal of the bankruptcy court's order.

Appellant Daniel J. Sherman, Chapter 7 Trustee for Velocita Worldwide Logistics, Inc. ("Velocita"), seeks to recover from Appellees their pro rata share of a $1,850,000 settlement paid by Velocita in an underlying state court action. The bankruptcy court granted summary judgment for Defendants-Appellees, finding no right of contribution or indemnification pursuant to a settlement agreement.

This Court reviews *de novo* the bankruptcy court's decision. *See Cooper Cameron Corp. v. U.S. Dep't of Labor, Occupational Safety and Health Admin.*, 280 F.3d 539, 543 (5th Cir. 2002). A bankruptcy court's order granting summary judgment is correct when the pleadings and evidence in the record establish that no genuine issue of material fact exists and the trustee is entitled to summary judgment as a matter of law. *Matter of Criswell*, 102, F.3d 1411, 1414 (5th Cir. 1997). A lower court's grant of summary judgment should be affirmed if the judgment can be supported on any ground. *Harris v. Edward Hyman Co.*, 664 F.2d 943, 945 (5th Cir. 1981).

Appellant raises several issues on appeal: (1) whether the bankruptcy court erred in concluding that a judgment entered under a settlement agreement does not provide a basis in law or in equity for a subsequent contribution claim; (2) whether the Bankruptcy Court erred in concluding that a right of contribution does not arise out of the agreed order entered into under the settlement agreement in this case; (3) whether the Bankruptcy Court erred in concluding that no right of contribution exists in this case because the prior judgment was entered pursuant to a settlement agreement; and (4) whether the Bankruptcy Court erred in its decision on the parties' respective motions for summary judgment.

First, it is important to note that indemnity and contribution are mutually exclusive; one with a right of indemnity has no right of contribution

against the indemnitor. RESTATEMENT (THIRD) OF TORTS § 23(c). In the bankruptcy court, Appellant pursued an indemnity claim that has been dropped here in favor of solely contribution.

There is no common law right to contribution among joint tortfeasors in Texas. *Iowa Mfg. Co. v. Weisman Equip. Co.*, 667 S.W.2d 209, 211 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Bradshaw v. Baylor University*, 52 S.W.2d 1094, 1101 (Tex. Civ. App. 1932)). Contribution thus must be statutorily created or based on a contract among joint tortfeasors, as Appellant alleges here. The underlying settlement agreement and agreed final judgment settled tort claims for misappropriation, tortuous interference with contract and prospective business relationships, unfair competition, violations of various statutory provisions, and a host of other claims. The agreed final judgment notes the defendants are joint and severally liable.

By statute, each defendant who is jointly and severally liable is liable for the damages recoverable by the claimant pursuant to statute in proportion to the respective percentage of responsibility. TEX. CIV. PRAC. & REM. CODE § 33.015. If a defendant who is jointly and severally liable pays a larger proportion of those damages than is required its percentage of responsibility, that defendant has a right of contribution for the overpayment against each other defendant with whom its (*sic*) is jointly and severally liable to the extent that the other defendant has not paid the proportion of those damages required by

that other defendant's percentage of responsibility. *Id.*

Yet there is no statutory right to contribution among defendants who enter into a joint settlement agreement that resolves all of a plaintiff's claims. *Southwestern Bell Tel. Co. v. Gen. Cable Indus., Inc.,* 966 S.W.2d 166, 171 (Tex. App.—El Paso 1998, pet. denied). The statute does not *create* a right of contribution in a settling party, but it also does not *prohibit* a contractual contribution claim. *Id.* In *Southwestern Bell,* the settlement agreement specifically provided for a "right to assert the claim for contribution or indemnity"—that is, it explicitly created a contractual claim for contribution between settling defendants. *Id.* at 168. "Although a settling defendant does not have a statutorily created right to seek contribution, neither of the [statutory provisions] prohibited the parties from creating a right to contribution by settlement agreement." *Id.* at 171.

Because there is no statutory right of contribution among settling defendants and no such provision was written into the contract, Appellant would have the Court imply one in the contract. "Under Texas law, there is a very limited right of contribution on a breach of contract claim that is, a contribution right exists among co-guarantors on a note, or in any situation where there is an implied promise of co-obligors to pay their proportionate shares of a common obligation." *Interstate Contracting Corp. v. City of Dallas,* No. 3:98-CV-2913-M, 2000 WL 1281198, at *4 (N.D. Tex. Sept. 8,

2000) (Lynn, J.), *rev'd on other grounds,* 407 F.3d 708 (5th Cir. 2000).

Texas public policy favors settlements to effectuate the efficient administration of justice. *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992). Appellant would have the Court open up a state court's agreed judgment, signed on May 25, 2004, in an ultimately futile attempt to determine the pro rata liability of ten individual defendants. Such an action would frustrate Texas public policy of encouraging settlement. Settling tortfeasors may agree among themselves as to their respective responsibility for a plaintiff's damages, *e.g., Southwestern Bell,* 966, S.W.2d at 171, rather than ask a court five years later to do to the work for them.

Here, there is no mention of contribution (or indemnity) between the Defendants in the settlement agreement. The settling parties were free to negotiate a provision providing for contribution. They did not include such a provision, and the Court is unwilling to imply one for them. The bankruptcy court was thus correct in granting Defendants-Appellees' motion for summary judgment, finding no basis in law or in equity for a contribution claim.

After review of the bankruptcy court record, the briefs of the parties, and the applicable law, the Court concludes that the bankruptcy court's determination was correct. The decision of the bankruptcy court is **AFFIRMED**. The Clerk is

hereby directed to prepare, sign and enter the judgment pursuant to Bankruptcy Rule 8016(a).

SO ORDERED.

March 26th, 2009.

s/ED KINKEADE
UNITED STATES DISTRICT JUDGE

[NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS ON
THE COURT'S DOCKET]

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 9, 2008

s/Harlin DeWayne Hale
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
Velocita Worldwide	§	
Logistics, Inc.	§	
	§	
Debtor.	§	Case No.
	§	05-86083-HDH-7
	§	

Daniel J. Sherman,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
William LaMothe,	§	
et al.,	§	
	§	
Defendants.	§	Adversary No.
	§	06-03533

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Came before the Court for hearing on June 4, 2008, the Defendants' Motion for Summary Judgment ("Defendants' Motion") and Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion").

Summary Judgment Standard

Summary judgment is proper if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issues of material fact, and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial burden of articulating the basis for it motion and identifying evidence, which shows that there is no

genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 322; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Material issues are those that could affect the outcome of the action. *Wyatt v. Hunt Plywood, Co. Inc.*, 297 F.3d 405, 409 (5th Cir. 2002).

If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1046-47 (5th Cir. 1996). The burden is on the non-movant to make a showing sufficient to establish an issue of fact for each element as to which that party will have the burden of proof at trial. *Epps. v. NCNB Texas Nat'l Bank*, 838 F.Supp. 296, 299 (N.D. Tex. 1993), *aff'd* 7 F.3d 44 (5th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The nonmovant's burden may not be satisfied by conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, metaphysical doubts as to the facts, or a mere scintilla of evidence; and legalistic arguments are not adequate substitutes for specific facts show that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 586-87; *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993); *Wallace*, 80 F.3d at 1047.

The court must draw inferences in the light most favorable to the party opposing the motion. *Anderson*, 477 U.S. at 255. However, factual controversies are resolved in favor of the nonmovant "only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir.), revised on other grounds upon denial of reh'g, 70 F.3d 26 (1995); *see also Wallace*, 80 F.3d at 1048; *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996). The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum*, 66 F.3d at 92. Once a summary judgment motion is made and properly supported, the nonmovant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

Application To the Present Motions

Based on the record made before the Court, there are no material fact issues in dispute, and the Court finds that summary judgment should be granted as a matter of law as to Defendants' Motion and denied as a matter of law as to Plaintiff's Motion.

The Defendants' Motion involves the right of contribution and indemnification among parties to an agreed judgment entered in the 192nd District

Court of Dallas County, Texas, pursuant to a settlement agreement. With respect to the right of contribution, under Texas law, a judgment entered under a settlement agreement does not provide a basis in law or in equity for a subsequent contribution claim. *Beech Aircraft Corp. v. Jinkins,* 739 S.W.2d 10, 21 (Tex. 1987). Therefore, a right of contribution does not arise out of the agreed order entered into under the settlement agreement between the Plaintiff and Defendants in this case. As to the right of indemnification, under Texas law, common law indemnity has been abolished, except where a party is vicariously liable. *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.,* 751 S.W.2d 179 (Tex. 1988); *Bonniwell v. Beech Aircraft Corp.,* 663 S.W.2d 816 (Tex. 1984). And a right of indemnification exists against a party who is vicariously liable only when there has been a judicial determination or admission that such party is liable to the claimant. *Humana Hosp. v. American Medical Systems, Inc.,* 785 S.W.2d 144 (Tex. 1990). Since there has been no finding in this case that the Defendants are liable to the Plaintiff, no right of indemnification arises.

The Plaintiff's Motion also involves the right of contribution and indemnification. As previously mentioned, no right of contribution or indemnification exists in this case since the prior judgment was entered pursuant to a settlement agreement.

Based on the foregoing, it is

ORDERED that the Defendants' Motion is **GRANTED** and Plaintiff's Motion is **DENIED**.

DER ###

[Case No. 09-10146 Document: 00511170272
Date Filed: 07/12/2010]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10416

In the Matter of: VELOCITA WORLDWIDE LOGISTICS, INC.
Debtor

DANIEL SHERMAN,
Appellant

v.

WILLIAM LAMOTHE; RAJAN SOBHANI; CHRIS BRACK; DANIEL ESTRADA; SCOTT STUDEBAKER; JAMES MICHAEL WALSH; BRANDON ROBINSON; PATRICK STRYER,
Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

ON PETITION FOR REHEARING

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:
s/Emilio M. Garza
United States Circuit Judge

175 (3)

No. 10-482

Supreme Court, U.S.
FILED
NOV 10 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DANIEL SHERMAN,

Petitioner,

v.

WILLIAM LAMOTHE, RAJAN SOBHANI, CHRIS BRACK, DANIEL ESTRADA, SCOTT STUDEBAKER, JAMES MICHAEL WALSH, BRANDON ROBINSON, and PATRICK STRAYER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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November 10, 2010

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a circuit court acts inconsistently with this Court's decision in *Lehman Bros. v. Schein,* 416 U.S. 386 (1974), or otherwise commits error, by deciding a state-law question without certifying that question to the state's supreme court where –

- the question presented is of no importance to the state's jurisprudence,
- there is no authority – old or new – from any state court for the proposed extension of long-settled state law to the petitioner's case,
- the proposed rule of law is so absurd that the three federal courts to address each chose different reasons – all of them sound – on which to consign it to a justly-deserved perdition, and
- the federal court rejected the proposed rule of law on the basis of the unvarying practice of the courts of Texas consonant with the principle of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

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STATEMENT OF THE CASE

Mr. Sherman, a bankruptcy trustee, commenced an adversary proceeding in bankruptcy court against former employees of the debtor, Velocita Worldwide Logistics, Inc. A year and a half prior to Velocita's filing bankruptcy, Velocita and the employees, who are the Respondents to Mr. Sherman's petition, signed a 37-page agreement to settle a bitter, crippling lawsuit brought by a competitor. One paragraph of the Settlement Agreement required the payment of $1.85 million to the competitor. All the funds for that payment came from the liquidation of some of Velocita's assets. The premise of Mr. Sherman's lawsuit against the Respondents – and originally, curiously enough, against Velocita itself, Velocita having been dropped on appeal – was that Texas law implied a right of contribution from the Settlement Agreement that they signed, requiring each of them to pay his *pro rata* share of the $1.85 million. The bankruptcy court and the district court of the Northern District of Texas and the Fifth Circuit Court of Appeals have all found that the Texas law is clear and does not permit such an implication. Mr. Sherman now asks this Court to review an issue of Texas state law.

FACTS OF THE UNDERLYING LITIGATION

Velocita Worldwide Logistics, Inc., opened for business in 2003 and went out of business in June of

2004 because of the huge litigation costs in a suit brought by a competitor, Excel Global Logistics, Inc. That lawsuit was settled in May of 2004 in a settlement agreement that was 37 pages long, and which the 192nd Judicial District Court of Dallas County entered as an Agreed Final Judgment and Permanent Injunction on June 3, 2004. BR0041-69 (without exhibits); BR0237-275(with exhibits) (the "Agreement").[1] It is this Agreement out of which Mr. Sherman contends a right to contribution should be implied under Texas law.

Mr. Sherman would like to style the Agreement as a settlement which was solely a matter of paying money to settle claims. It is hardly that, as even the most cursory reading reveals. One does not need 37 pages of court order to settle a lawsuit for cash. The payment of cash is handled in a single paragraph, paragraph U on page 19 of the Agreement. BR0059; 0255. The vast bulk of the Agreement is given over to injunctions, most of them directed against Velocita: paragraphs A (extending over six pages), B, C, E, F, R, S, U, V, W, X, AA, FF and GG. BR0043-0050; 0057-0064; 0238-0246; 0255-0260. The Agreement required Velocita on or before June 4, 2004, to terminate its employees, to dispose of its assets, and to cease all activities except for the collection of receivables and payment of creditors. Paragraphs E and F,

[1] The abbreviation "BR" refers to the bankruptcy court record.

BR0049-0050; 0245-0246. There were, in addition, injunctions against each one of the individual defendants, restraining each of them from a variety of activities, each injunction tailored to the individual defendant enjoined. Each one of these enjoined individual defendants was substantially limited in the business he or she could transact over a period of years. There were also affirmative obligations, such as assisting in pending litigation, Paragraph S, BR0058; 0254, and revealing information about disloyal Exel employees and assisting in any litigation against those employees. Paragraph T, BR0058-0059; 0254-0255.

While the Agreement settled the lawsuit, it did not end the employees' potential liability to Exel since it reserved Exel's right in the case of certain violations of the Agreement, not only to file the agreed judgments attached as Exhibits L, M and N, automatically imposing stipulated damages in amounts of $100,000, $10,000 and $250,000, respectively, but also to consider each such violation a "contempt of court, subject to fines, penalties, damages and costs, including attorney's fees . . . [and] an appropriate monetary judgment." Paragraph AA, BR0061-0062; 0257-0258.

Not only is there no provision in the Agreement for any contribution among the various defendants who signed it; contribution is expressly barred by the Agreement on pages 2-3:

> This Agreed Judgment **resolves all matters between the parties**, past or present, known

> or unknown, including but not limited to matters related to Civil Action No. 03-11467-K pending before the District Court of Dallas County, 192nd Judicial District. [Emphasis added.]

BR0042-43; 0238-0239.

While the Agreement required Velocita to stop doing business, BR0049-0050; 0245-0246, it allowed Velocita to collect its receivables and pay its creditors. BR0061; 0257. In the ensuing six months, Velocita was able to collect about ninety percent of its receivables, BR0128, and pay $600,000 to its unsecured creditors. BR0171; 0234. A year and a half after closing down, in October of 2005, Velocita filed bankruptcy to stop the collection efforts of creditors who were unconvinced that Velocita had no assets. BR0126-0127. Proofs of claim totaling $250,000 were filed in the Velocita bankruptcy; Velocita had paid roughly seventy percent of its debts before filing for bankruptcy protection.

The only complete statement of the history of the events leading up to the execution of the Agreement is found in the declaration of respondent William LaMothe, filed on November 26, 2007, as Exhibit A to Defendants' Motion for Judgment on the Pleadings and to Dismiss for Failure to State a Cause of Action. BR0231-0235. It is wholly uncontradicted. It reads, in relevant part:

> 2. Skyteam, Inc., was incorporated on April 4, 2002. The corporation was intended

to be a holding company for certain assets, but that never came to pass, and it remained dormant until the summer of 2004. At that time, it began operating in the air freight forwarding business, and the name was later changed to Velocita Worldwide Logistics, Inc.

3. Air freight forwarding is a relatively simple business. Customers are businesses that need air freight shipping, frequently on an expedited basis. When the customer calls the air freight forwarder, stating the specifics of its need – how much is being shipped, what weight, what volume, how quickly it needs to arrive – then the air freight forwarder quotes a price and arranges not only for the air freight space on scheduled airline fights, but also for the ground transportation to and from the airport.

4. I have been in the freight forwarding business since 1990. I founded a company named Skyking Inc, which I sold in 1997 to a company that, a few years later was acquired by Exel, Inc. The name of my former company then became Exel North American Logistics, Inc. I entered into a five-year employment agreement as part of the acquisition. I completed my five years with Exel and then, my wife began to operate Velocita as an air freight forwarder. She hired me and several other former Skyking employees.

5. We used no trade secrets of Exel's. Any restrictions in my employment contract

had expired long before I went to work for Velocita. Nonetheless, Exel and Exel North American Logistics commenced a lawsuit against Velocita and its employees, alleging use of its trade secrets, violations of employment contracts and other matters. I have been involved in some litigation in my years in the freight forwarding business, but I have never been involved in anything as vicious or as malicious as this litigation. It was clear to me that the aim of the lawsuit was to put Velocita out of business, and my conclusion was confirmed during the mediation that led to the settlement with Exel. The claims that they made against Velocita and its employees were without merit. For example, they sued Rajan Sobhani for breaching his contract with Exel. He had left Exel over a year prior to coming to work for Velocita, and when he left Exel he had received a complete, written release from all restrictions contained in his employment contract.

6. The litigation was vicious and unprincipled and was carried on without concern for expense. I have come to understand that Exel spent three and a half million dollars in fees for lawyers and investigators. The lawyers representing us said that they had never seen such a "take-no-prisoners" litigation and that Baker Botts, the plaintiffs' firm, were litigating as if they had Fort Knox for a client. They also said that plaintiffs' counsel told them that the aim of the Exel was to squash Velocita and everyone

associated with it. Velocita itself paid over $400,000 in attorney's fees in this lawsuit and by the time of settlement the fees were being incurred at a six-figure monthly rate – all fees being paid by Velocita. Because of differing interests of the defendants, there were three different law firms involved in the defense, Kane Russell Coleman & Logan, Loewinsohn & Flegle, and Thompson & Knight, all of which participated in the mediation that produced the Settlement Agreement. During settlement discussions and during mediation Velocita's interests were always separately considered and were never ignored.

7. There came a point in the Spring of 2004 when Velocita's investors, who were approximately two million dollars in the hole, informed Velocita that they were unwilling to put further funds into either the corporation or the defense of the lawsuit. Although all of the defendants in that suit felt themselves to be innocent of any of the charges made against them, we had no alternative but to settle. There was no way that we could continue to operate the company and litigate the case simultaneously. The costs of the lawsuit were beyond what Velocita's income could support, and the all-encompassing nature of the lawsuit made it impossible for employees to concentrate on Velocita's business.

8. At that point, the parties commenced a mediation to settle the lawsuit.

The mediation went for three days and produced the settlement that is embodied in the final judgment of the lawsuit. Not only was the settlement negotiated at arm's length, it was negotiated with significant mutual hostility. The settlement was approved by the judge and entered as an order in the case.

9. The settlement amount of $1.85 million was based on the defendants' estimation of what it would cost to litigate the case to a full judgment. But the settlement was not simply a matter of money. Exel demanded that Velocita cease business and all of the defendants had injunctions entered against them. I was obliged to refrain from doing any [*sic*] anything in the freight forwarding business for two years. My loss in salary for that period was not less than one million dollars, not counting the year I worked for Velocita during which, because of the litigation, I received no salary whatsoever.

10. It was never the intent of the parties to the settlement to leave the creditors of Velocita unpaid. Velocita had receivables and, if enough of them were paid, Velocita's creditors could all be paid, perhaps at a rate of 100 cents on the dollar, perhaps less. Unfortunately the word got out that Velocita was closing its doors and a substantial number of its invoices were never paid. Nonetheless, over the six months after the settlement, Velocita collected enough receivables to pay roughly $600,000

> to its creditors in the six months after it closed down.

BR0170-0171; 0231-0234.

A statement of this case would be incomplete if it did not go through Mr. Sherman's manic gyrations as he attempted to find a theory to support his lawsuit. Mr. Sherman filed his original complaint on December 14, 2006, BR0193-201, but did not serve the Defendants until after he had filed his First Amended Complaint on October 2, 2007. BR0202-210. The First Amended Complaint contained somewhere around a dozen causes of action: in paragraph 14, violation of the Texas Theft Liability Act, breach of fiduciary duty, and conversion, BR0206; in paragraph 15, civil conspiracy, BR0206; in paragraph 16, breach of fiduciary duty (again), fraud and breach of contract, BR0206; in paragraph 17, turnover, BR0206-207; in paragraph 18, fraudulent transfer, BR0207; and in paragraph 19, joint tortious activity, contribution, indemnity and vicarious liability, BR0207.

On March 6, 2008, Mr. Sherman again amended his complaint, and his Second Amended Complaint, BR0018a-23, sought contribution or indemnity on two bases: first, arising out of an "implied contract or equitable contribution," Paragraph 13, BR0021, and second, because the defendants were "joint-tortfeasors." Paragraph 14, BR0022. Although he did not amend his complaint again, Mr. Sherman continued through the course of the litigation to shift his ground. In his reply brief in support of his motion for summary

judgment, for example, Mr. Sherman added a cause of action: he claimed that he was entitled to recover contribution for payment not only of a contract, but also of a judgment. Trustee's Reply, Paragraph 7, BR0180. And when he filed his motion for summary judgment, Mr. Sherman stated that since his cause of action was "not a tort case, none of the Texas statutory schemes apply," Plaintiff's Motion for Partial Summary Judgment Paragraph 9, BR0083, appearing thereby to have abandoned his claim to contribution from joint tortfeasors. It was never clear in the bankruptcy court which claims Mr. Sherman was still advocating and which he had abandoned. It was only in his appeal to the Fifth Circuit that Mr. Sherman finally settled on a single theory of recovery: an implied right of contribution arising from the Agreement. It is worth noting that Mr. Sherman never did any discovery on any of his claims.

The Respondents have repeatedly, at every level of this litigation, pointed out the practical effects of Mr. Sherman's theory of recovery:

> [Mr. Sherman's] argument that Velocita paid more than the other settling defendants and should therefore be able to pursue its former employees to get its money back runs contrary to common sense. When cases with multiple defendants settle, it is not in any wise unusual for the defendants to pay unequal shares of the settlement amount. The reasons for this are legion: differing perspectives on who is actually the more guilty party, differing abilities to come up with cash

for settlement, family ties, business ties, friendship; in practical terms, the list is endless.

. . . . Where there are multiple defendants paying, determining who is going to pay how much *always* is an issue. It is always settled one way or another among the defendants before any money is put on the table. It is rare that the division of financial responsibility appears in the agreement itself, but it is *always* the case that under the settlement agreement, all settling defendants are bound to pay the entire amount, irrespective of what their individual shares of that obligation may be under the agreement among themselves. The obvious reason for having all defendants sign off on the payment of the full sum is that since the plaintiff is releasing all defendants, he wants to bind all the defendants to pay. If the deep pocket doesn't pay – and typically by the time of settlement the plaintiff knows who has the cash – he can go after any or all of the settling parties. Even if an impecunious party cannot pay, whatever ties that party may have to the deep pocket that caused the [*sic*] him to agree to pony up in the first place can be used to make sure the money is forthcoming.

Under Mr. Sherman's view of the law, there is only one option: all defendants must pay equal shares. His brief is quite clear about this:

> apportioning liability under the contract is no more complicated than dividing the settlement amount by the number of settling parties.

Appellant's Brief at 18. That one-size fits-all solution would bring joy to the hearts of neither plaintiffs nor defendants. Procrustes, on the other hand, would be delighted.

> If what Mr. Sherman novel proposal [*sic*] were the law, it would mean that as soon as the Settlement Agreement was signed, Mr. LaMothe, who signed the agreement as President of Velocita, could turn to his fellow employees as they walked out of the mediation room and say: "By the way, since Velocita paid all the money, I'm going to sue you on behalf of Velocita for your *pro rata* share of the settlement payment." Having thereby reneged on the critical internal deal that made the settlement possible, Mr. LaMothe would be lucky to escape with his life.

> Nothing could be more destructive of the willingness of parties to settle cases than Mr. Sherman's rule of law. If his novel concept were the law, co-defendants settling cases would fear that the one who paid the lion's share of the cash might later suffer buyer's regret and put everybody back in the soup. And while they might personally trust the deep pocket defendant to stick to the deal, they would appropriately fear a bankruptcy filing which might produce a trustee as wrongheaded – dare one say as venal? – as

Mr. Sherman. The Rule in Sherman's Case would make every final settlement interlocutory, and litigants' fear that the very agreement they have crafted to end the pain of litigation might itself engender further lawsuits and would make settlements in cases with multiple defendants difficult if not impossible to consummate.

Mr. Sherman further argues:

> By signing the settlement agreement, a contract, the appellees became co-obligors with Velocita for payment of the $1.85 million.

Appellant's Brief at 16. But by signing the Settlement Agreement the employees also became co-obligors, if you will, on a vast number of other obligations. Since these other obligations were part of the price that they jointly paid to get off the hook in the Exel lawsuit, the employees should, by Mr. Sherman's logic, be obliged to reimburse each other for losses incurred in performing those other promises. For example, the only employee wholly forbidden to work in the freight forwarding industry was Mr. LaMothe; Exel was apparently as interested in putting him out of business as it was in putting Velocita itself out of business. Given the importance to Exel of handcuffing Mr. LaMothe, Mr. Sherman's logic argues that Mr. LaMothe should have a claim against the other employees to reimburse him for the million dollars in personal income he lost by

> honoring his promises set out in the Settlement Agreement. This is of course absurd – as is Mr. Sherman's whole cockeyed notion of contribution arising from a settlement agreement.

Respondents' Brief in the Fifth Circuit, pp. 13-16.

The Respondents believe that the Court's knowing these underlying facts and contentions will help it to determine whether to grant Mr. Sherman's petition.

REASONS FOR DENYING THE WRIT

At first glance, Mr. Sherman's Petition for Certiorari appears to present at least a marginally plausible case for the granting of the writ of certiorari. That, however, is only because Mr. Sherman, as in every other pleading filed in this case, has vastly oversimplified facts of the case, assiduously avoiding those inconvenient facts that undermine his arguments.

In over a hundred years of rulings in Texas courts on the right of contribution implied from contracts, the doctrine has only been applied to two types of contracts: surety agreements and guaranty agreements. Mr. Sherman has invited three federal courts to create new law for Texas. They have all declined to do so, for good and sufficient reasons.

PETITIONER'S QUESTION PRESENTED MISLEADS THE COURT

Perhaps the best place to begin is with Petitioner's question presented, which reads as follows:

> QUESTION PRESENTED
>
> The court of appeals decided this bankruptcy appeal by resolving on policy grounds what it deemed a question of first impression under Texas law, without certifying that question to the Texas Supreme Court. In doing so, the court disregarded two Texas Supreme Court decisions from the 1890's, apparently deeming them too old to be instructive. The question presented is:
>
> 1. Whether a circuit court acts inconsistently with this Court's decision in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), or otherwise commits error, by deciding a state-law question without certifying that question to the state's supreme court where –
>
> - the question presented is important to the state's jurisprudence,
> - there is authority – old but not overruled – from the state's supreme court resolving the question contrary to the federal court's resolution of it,
> - the question is difficult enough that the three federal courts to address it all resolve it on different theories and grounds, and

- the federal court decides the issue on policy grounds.

This question presented is an exercise in utter fantasy. Not one of the four bullet points is even close to being the truth. Let us go through it point by point.

First Untruth: The Question Presented Is Important to the State's Jurisprudence

No litigant in those over 100 years has ever had the temerity even to raise the issue. Thus to say that this issue is important to Texas jurisprudence goes far beyond hyperbole into the category of flat blowin' smoke. The legal issue may be of importance to Mr. Sherman, but it is not even so much as a gnat on the hindquarters of the rhinoceros that is the law of Texas.

Second Untruth: There Is Authority – Old but Not Overruled – from the State's Supreme Court Resolving the Question Contrary to the Federal Court's Resolution of It

To claim that there is Texas Supreme Court authority to the contrary is utter poppycock. Neither party and no court was able to find a single case where the right of contribution was implied from any contract other than a surety or guaranty agreement.

It was on this complete lack of authority that the Fifth Circuit decided the case.

The Fifth Circuit reasoned as follows:

> Texas courts have long allowed actions for contribution in guaranty and surety cases even where the right was not set out in the note or contract. Occasionally, Texas courts have recognized the right to contribution in language broad enough to be construed to cover the situation here. . . .
>
> * * *
>
> Notwithstanding the broad language quoted above, Texas courts, to the best of our knowledge, have not found occasion to extend the contribution right implied in guaranty and surety agreements to other types of contracts.

Sherman v. LaMothe, 608 F.3d 212, 214-215 (5th Cir. 2010).

That is an accurate statement of the law on an implied right of contribution in Texas. The implied right is not a recent innovation of Texas law; it has been in place for over a century, probably closer to a century and a half. As the Fifth Circuit noted, in all that time, the doctrine has never been applied to any contracts except sureties and guaranties. Since no research, whether research by a party or by a court has unearthed *any* case that has extended the doctrine beyond those categories, it is a solid inference that the settled law of Texas is that there is an

implied right of contribution *only* in surety and guaranty contracts. The agreement in this case is neither a guaranty nor a surety. To extend the implied right of contribution to a settlement agreement would create new Texas law.

The Fifth Circuit pointed out that this extension of the implied right of contribution to a settlement agreement would be a radical change in the law because of the substantial differences between a surety or guaranty agreement and a settlement agreement:

> The factors that justify the contribution right implied in sureties and guaranties are absent here. First, the subject matter of the settlement agreement involved more than money. Although a $1.85 million payment constituted one part of the agreement, the remainder comprised individually tailored injunctions against the Employees and Velocita. Texas courts have recognized that the general rule of an equally divided pro rata contribution is altered when, for example, co-obligors shared unequally in the consideration received out of the note, in which case "contribution may be prorated according to the benefits each received." *Dittberner v. Bell*, 558 S.W.2d 527, 534 (Tex. Civ. App. 1977). In this case, the benefits that the individual Employees received from being released from the suit were presumably not equal. Some Employees must have been less involved in the actions that Exel alleged were trade secret violations. The individually

> tailored injunctions support this contention: LaMothe, for example, faced an injunction that was notably more strict than that faced by the other Employees. Thus, contrary to the Trustee's arguments, implying a right to contribution would necessarily force the district court to open up the underlying settlement to determine an equitable division among the Employees.

698 F.3d at 215-216 (Footnote omitted).

The sole authority on which Mr. Sherman relies is one phrase in one case, *Faires v. Cockrill*, 88 Tex. 428, 31 S.W. 639 (1895), a phrase his brief emphasizes in the following quotation from *Faires*: that "the right [to contribution] applies to promises 'to pay a sum of money, ***or to do something for***' another party. *Faires v. Cockrill*, 31 S.W. 190, 193 (Tex. 1895)" Petition at 13 (Italics and boldface added by Mr. Sherman). The quoted language, however, is part of a long, irrelevant section on subrogation – irrelevant because the issue before the court was *not* whether there was a right to contribution, but what statute of limitations applied to the Plaintiffs' action. The court frankly owned up to its judicial self-indulgence, stating that

> [t]hese cases do not bear directly upon the question under consideration, but we cite them to show that our decisions recognize

> the doctrine of subrogation to its fullest extent.

Faires, 88 Tex. at 437. The court did not hold that the contract in that case was one from which a right of contribution could be implied.

The question remains, however: what kind of a contract *was* it that *Faires* was dealing with? One cannot tell from *Faires* itself. *Faires* is a typical nineteenth century American legal opinion, rambling on law and opaque on facts. A later lower court opinion, however, tells us precisely what kind of a contract it was: a plain-vanilla guaranty. *Faires* remanded the case, and after a retrial there was a second appeal, reported as *Mateer v. Cockrill*, 18 Tex. Civ. App. 391 (1898). *Mateer* makes clear that the contract *Faires* dealt with was a guaranty. 18 Tex. Civ. App. at 394 ("*guarantee* contract;" "paid on the bonus *guaranteed*;" "*co-obligors on the guarantee* given the company;" plaintiffs "dismissed as to all who did not sign the *guarantee*;" "The petitioners prayed for judgment for each of them, as against the defendants, who were their *co-obligors on the guaranty*"); 396 ("implied promise of the *guarantors*"); 398 ("*guarantors*"). Neither *Faires* nor *Mateer* in any way deviates from the principle enunciated by the Fifth Circuit: that in Texas, a right to contribution is implied only from surety and guaranty agreements.

Third Untruth: The Question Is Difficult Enough That the Three Federal Courts to Address it All Resolve it on Different Theories and Grounds

Give us a break. It is true that each of the courts that looked at this case had a different rationale for justifiably consigning this case to the rubbish heap of judicial history. But that is not because of any judicial confusion; it is a reflection of the fact that there are myriad reasons why this cockeyed case is utterly without merit. This case is like giving Josh Hamilton[2] a fat pitch in the center of the strike zone; he has to think: right field, left field, or center field; but there is never any question but that that ball is gone.

None of the grounds on which the lower courts dismissed and affirmed the dismissal is wrong; they are all sound choices among the many rationales on which the case could be dismissed.

Bankruptcy Judge Harlin "Cooter" Hale was right when he ruled as follows:

> With respect to the right of contribution, under Texas law, a judgment entered under a settlement agreement does not provide a basis in law or in equity for a subsequent

---

[2] Kind of a hero down here in Texas. Plays baseball, you know. Pretty well, too. Albeit perhaps not quite well enough in the past few games.

> contribution claim. *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 21 (Tex. 1987). Therefore, a right of contribution does not arise out of the agreed order entered into under the settlement agreement between the Plaintiff and Defendants in this case.

That is the law in Texas, under a long string of cases in the last quarter of the twentieth century dealing with common-law rights to contribution.

And District Judge Ed Kinkeade was right when he ruled:

> Because there is no statutory right of contribution among settling defendants and no such provision was written into the contract, Appellant would have the Court imply one in the contract.
>
> * * *
>
> Texas public policy favors settlements to effectuate the efficient administration of justice. *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992). Appellant would have the Court open up a state court's agreed judgment, signed on May 25, 2004, in an ultimately futile attempt to determine the pro rata liability of ten individual defendants. Such an action would frustrate Texas public policy of encouraging settlement. Settling tortfeasors may agree among themselves as to their respective responsibility for a plaintiff's damages . . . rather than ask a court five years later to do the work for them.

There is no misstatement of law in either opinion, nor did the Fifth Circuit so rule. The Fifth Circuit simply chose to focus on another of the defects in Mr. Sherman's misbegotten lawsuit in affirming its dismissal.

Fourth Untruth: The Federal Court Decides [*sic*] the Issue on Policy Grounds

The Fifth Circuit decided this case by ruling that in Texas the law is clear: the implied right of contribution is limited to surety and guaranty contracts. There was, indeed, a policy reason underlying that decision: the policy that federal courts should not make new law for the states, that federal courts are to follow, not create state law precedent. This policy has been at the heart of federal court jurisprudence since *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). It is still sound policy.

There is one particularly telling comment towards the end of the Fifth Circuit's opinion:

> Additionally, nothing indicates that contribution would accord with the expectations of the Employees and Velocita. Allowing contribution would imply an eleven-way promise that the Employees and Velocita would almost surely not have made in the circumstances of this case. The Trustee has not pointed to anything in the record indicating that, *ex ante*, the Employees contemplated

> an arrangement at all analogous to a guaranty.

698 F.3d at 216. All three of the judges on the Fifth Circuit panel have had long experience in private practice – the law practice of two of the three having been in Texas – and on lower courts; that experience has given each of them a keen practical sense of how lawsuits are settled. Why did they include this aside? One guesses that, perceiving a need, they wanted to educate Mr. Sherman.

THE FIFTH CIRCUIT'S DECISION IS IN NO WAY INCONSISTENT WITH *LEHMAN BROS. V. SCHEIN*

Petitioner contends the Fifth Circuit's ruling is inconsistent with *Lehman Bros. v. Schein,* 416 U.S. 386 (1974). Nothing could be further from the truth.

In *Lehman*, the issue before the Second Circuit Court of Appeals was the scope of corporate fiduciary duties in an insider trading case. The court determined that while Florida law applied, there was no decisive Florida precedent. It then turned to other states' law to establish what Florida courts "would probably" do. *Id.* at 389.

This case is wholly unlike *Lehman*. While the Second Circuit in *Lehman* ruled that there was no governing Florida precedent – and this Court agreed that there was "great unsettlement of law," *id.* at 390 the Fifth Circuit in this case determined that the

law of Texas is in fact settled: in over 100 years of rulings, the right of contribution has never been implied in any contract other than surety and guaranty contracts. While the Second Circuit in *Lehman* turned "to the law of other jurisdictions" to make its ruling, the Fifth Circuit committed no such apostasy.

The *Lehman* court was quick to point out that it did not suggest that even

> where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. . . . Its use in a given case rests in the sound discretion of the federal court.

Id. at 390-391. Mr. Sherman has given no legitimate basis on which to found any conclusion that the discretion of the Fifth Circuit was unsoundly exercised. In his petition he states that this court should grant his petition "to provide much-needed guidance on certification," Petition at 2, but does nothing to explain why such guidance is needed. In the Respondents' view, leaving certification to "the sound discretion of the federal court," as the *Lehman* court ruled, seems to say all that needs to be said.

There is another aspect to the exercise of this court's discretion in whether to grant certiorari in this case. In *Lehman*, Mr. Justice Douglas opined that use of the certification procedure

> does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.

Id. at 391. In his concurrence, Mr. Justice Rehnquist pointed out that certification

> entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court . . . additional time and money are required to achieve a [state law] determination.

and reviewed the extensive procedural requirements of certification to the Florida Supreme Court. *Id.* at 394-395. Those requirements are similar to the Texas rule governing certification, Rule 58 of the Texas Rules of Appellate Procedure, in the Appendix hereto. Certification to the Supreme Court of Texas would entail a new round of briefing, oral argument and expense, duplicative of what has already transpired in the Fifth Circuit.

Moreover, Mr. Sherman did not make a request for certification until the motion for rehearing in the Fifth Circuit, a motion that could have been made in either of the two lower courts. He argues that his lack of diligence should not be held against him because he "had no idea that the court of appeals would consider [his] cases unworthy of respect." By the time he got to the Fifth Circuit, Mr. Sherman had been shot down twice by judges who found his cases unworthy of respect. If he had "no idea" that bad things would happen in the Fifth Circuit, the Respondents would suggest that he is slow-witted beyond the tolerance of this Court. It would be something different if he had actually found a case – *any* case – extending the implied right of contribution

beyond sureties and guaranties. But he found no authority for his extension of the law, nor did the Respondents nor did any of the five judges who ruled on his case.

Mr. Sherman has had three bites at the apple before judges familiar with Texas law and has lost all three times. Enough already.

CONCLUSION

It beggars credibility that Mr. Sherman has the effrontery to contend there is an issue in his case worthy of this overworked Court's attention. This Court should deny his application for a writ of certiorari.

Respectfully submitted,

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TEXAS RULES OF APPELLATE PROCEDURE

Rule 58. Certification of Questions of Law by United States Courts

58.1. Certification

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

58.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

58.3. Transmission of Certification Order

The clerk of the certifying court must send to the clerk of the Supreme Court of Texas the following:

(a) the certification order under the certifying court's official seal;

(b) a list of the names of all parties to the pending case, giving the address and telephone number, if known, of any party not represented by counsel; and

(c) a list of the names, addresses, and telephone numbers of counsel for each party.

58.4. Transmission of Record

The certifying court should not send the Supreme Court of Texas the record in the pending case with the certification order. The Supreme Court may later require the original or copies of all or part of the record before the certifying court to be filed with the Supreme Court clerk.

58.5. Fees and Costs

Unless the certifying court orders otherwise in its certification order, the parties must bear equally the fees under Rule 5.

58.6. Notice

If the Supreme Court agrees to answer the questions certified to it, the Court will notify all parties and the certifying court. The Supreme Court clerk must also send a notice to the Attorney General of Texas if:

(a) the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer; and

(b) the State of Texas or an officer, agency, or employee of the state is not a party to the proceeding in the certifying court.

58.7. Briefs and Oral Argument

(a) *Briefs.* The appealing party in the certifying court must file a brief with the Supreme Court clerk within 30 days after the date of the notice. Opposing parties must file an answering brief within 20 days after receiving the opening brief. Briefs must comply with Rule 55 to the extent its provisions apply. On motion complying with Rule 10.5(b), either before or after the brief is due, the Supreme Court may extend the time to file a brief.

(b) *Oral Argument.* Oral argument may be granted either on a party's request or on the Court's own initiative. Argument is governed by Rule 59.

58.8. Intervention by the State

If the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer the State of Texas may intervene at any reasonable time for briefing and oral argument (if argument is allowed), on the question of constitutionality.

58.9. Opinion on Certified Questions

If the Supreme Court has agreed to answer a certified question, it will hand down an opinion as in any other case.

58.10. Answering Certified Questions

After all motions for rehearing have been overruled, the Supreme Court clerk must send to the certifying court the written opinion on the certified questions. The opinion must be under the Supreme Court's seal.

No. 10-482

SUPREME COURT, U.S.
FEB 19 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

IN THE MATTER OF VELOCITA WORLDWIDE LOGISTICS, INC.,
Debtor.

DANIEL SHERMAN,
Petitioner,
v.
WILLIAM LAMOTHE, RAJAN SOBHANI, CHRIS BRACK, DANIEL ESTRADA, SCOTT STUDEBAKER, JAMES MICHAEL WALSH, BRANDON ROBINSON, AND PATRICK STRAYER,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Sherman respectfully submits this reply brief in support of his petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

ARGUMENT IN REPLY

Mr. Sherman believes this case presents an ideal vehicle for this Court to refine its instructions concerning certification of state law issues to state courts in non-diversity, non-*Pullman* cases. In opposition, Respondents have tendered a bitterly vituperative brief in which they accuse Mr. Sherman of intentionally misleading this Court at every turn. As he has throughout this litigation, Mr. Sherman yet again will ignore these personal attacks and focus solely on the legal issue.

The principal problem with Respondents' argument is its misapprehension of the circuit court's opinion. Contrary to Respondent's assertion, the circuit court did not find that "Texas law is clear" in not permitting a contribution claim among settling co-obligors. At most, the circuit court found that Texas law is silent on that question. And despite Respondents' argument to the contrary, the three federal courts each relied on different legal principles to resolve the matter.

These narrow facts present an opportunity to provide guidance on certification without curtailing the broad discretion normally afforded to lower courts in evaluating the merits of certification.

I. MR. SHERMAN PROPERLY DESCRIBED THE ISSUE AS IMPLICATING CORE FEDERALISM CONCERNS.

Because this case presents certification in a non-diversity case not involving *Pullman* abstention, it directly implicates the balance between national and state judicial power. These concerns are at their height in a case like this one, presenting an important state-law issue without clear guidance from state courts, decided on policy grounds by federal courts.

A. The Issue Is Important To Texas Law.

This case could affect settlement of scores of Texas lawsuits involving multiple defendants. If left undisturbed, the circuit court's opinion permits settling Texas defendants who agreed to share in the burden of settlement to walk away without liability when a co-obligor pays the joint and several obligation—leaving the paying co-obligor with no recourse.

Respondents accuse Mr. Sherman of inflating this case's importance to Texas law, yet Respondents themselves contend that permitting contribution "would make settlements in cases with multiple defendants difficult if not impossible to consummate" (Brief in Opposition at 13). According to Respondents, "[n]othing could be more destructive of the willingness of parties to settle cases . . . ." (*Ibid* at 12). If true, these statements necessarily mean that the situation presented by this case—multiple settling defendants with a joint and individual obligation—is a frequent occurrence in Texas. By

Respondents' own analysis, then, resolution of this case is important to Texas law.

B. Old Texas Cases Support Mr. Sherman.

Respondents contend that all three lower courts found Texas law to be "clear" in rejecting contribution. The circuit court certainly did not find any such clarity, explicitly noting that in some cases, "Texas courts have recognized the right to contribution in language broad enough to be construed to cover the situation here . . . ." (Petition App. at 4a).

The circuit court's statement that Texas courts have "not found occasion to extend the contribution right implied in guaranty and surety agreements to other types of contracts" (Petition App. at 5a) was a reiteration of its belief that the question is one of first impression in Texas; it was not, as Respondents intimate, any indication that governing Texas case law has rejected such a claim. Saying that Texas courts have not been presented with a claim is very different from saying they have considered and rejected it.

Respondents continue to argue that only an ordinary financial guaranty was at issue in *Faires* v. *Cockrill*, 31 S.W. 639 (Tex. 1895). That argument might have merit were it not for the court's explicit statement in the subsequent appeal that "the duties and liabilities of these guarantors, as between themselves, was not in all respects the same as those existing between the guarantors of a note . . . ." *Mateer* v. *Cockrill*, 45 S.W. 751 (Tex. Civ. App. 1898). In fact, from the very start, the Texas

Supreme Court made clear the rule embraces all species of contracts:

> When two or more persons enter into a joint and several obligation by which they agree to pay a sum of money to, *or to do something for*, another, the law implies a promise from each of such obligors to each of the others that each will indemnify the other in case he pays *or performs* more of the obligation than his proportional part.

Faires, 31 S.W. at 193 (emphasis added). The phrase "pay a sum of money to, or to do something for" indicates plainly that the rule extends to contractual obligations besides the payment of money.

In any event, all this begs the question; the issue presented by Mr. Sherman's petition is whether it should be a national or state court that decides the meaning and import of these Texas cases. The circuit court made no attempt to distinguish *Faires* on the basis urged by Respondents or otherwise. From the comments made in oral argument, it appears the court simply viewed these cases as being too old.

C. The Federal Courts Used Different Grounds To Decide The Case.

Respondents characterize the three different federal court theories in this case as three independent and consistent rationales for rejecting Mr. Sherman's claim. Mr. Sherman sees no point to arguing at length about what the opinions say, as they are appended to his petition. Suffice it to say

that the bankruptcy court applied a line of Texas cases involving non-settling joint tortfeasors. Neither the district court nor the circuit court even mentioned this theory—despite Respondents' continued reliance on it throughout the litigation. While the district court and circuit court opinions are more similar in their reliance on certain factors—particularly the need to determine an equitable division among the Respondents—substantial portions of the two opinions make clear their very different approaches to the issue.

D. The Circuit Court Relied on Policy Grounds To Decide The Case.

To be sure, the circuit court did not decide the matter solely on public policy grounds; the court also examined the underlying contract and attempted to determine the parties' reasonable expectations under it. But Respondents' claim that public policy was not a consideration is belied by the opinion itself. The circuit court explicitly held that "[t]he difficulty of equitably apportioning contribution here weighs against implying the remedy" (Petition App. at 7a). In other words, the circuit court decided that the difficulties in adjudicating liability outweighed the interest in affording a co-obligor the contribution remedy—a policy decision.

The danger in permitting the federal court to impose its policy judgment is that in other contexts, Texas courts have apparently deemed the disquieting of litigation to be an acceptable cost. After all, Texas law permits a contribution claim by one judgment debtor against another. *Greenspan* v. *Green*, 255 S.W.2d 917 (Tex. Civ. App. – Dallas

1953, writ ref'd n.r.e). Similarly, Texas courts might deem policy considerations favoring enforcement of co-obligor liabilities in a settlement agreement to be more important than the potential disquieting of litigation. But without certification, neither the circuit court nor any other court will know how the Texas Supreme Court would weigh these competing policy considerations.

II. THIS CASE PRESENTS CONSIDERATIONS LIKE THOSE IN *LEHMAN BROS.*

As Mr. Sherman pointed out in his petition, this case presents an even more compelling case for certification than the facts in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974), where this Court vacated a circuit court's decision and remanded for certification. Mr. Sherman never suggested that the facts in this case are identical to those in *Lehman Bros.*; indeed, he took pains to point out differences (Petition at 10). Instead, he argued that the underlying analysis in *Lehman Bros.* appears to suggest that certification is similarly appropriate in this case. And he certainly pointed out the lack of clarity and consistency among lower courts in applying the discretion afforded to them regarding the propriety of certification. As a result, the additional guidance this Court might present through this case will inform future use of certification in non-diversity, non-*Pullman* cases.

CONCLUSION

Based on this Court's decision in *Lehman Bros.*, and principles of comity and federalism, the petition for a writ of certiorari should be granted. Alternatively, this Court should vacate the circuit

court's decision and remand the case for certification.

Respectfully submitted,

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